

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KLICKITAT COUNTY, a political subdivision of the State of Washington,

Plaintiff,

vs.

U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; LAWRENCE ROBERTS, in his official capacity as Acting Assistant Secretary-Indian Affairs; STANLEY M. SPEAKS, in his official capacity as Regional Director, Bureau of Indian Affairs,

Defendants.

No. 1:16-CV-03060-LRS
ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is Defendants' Motion To Dismiss (ECF No. 9).

This motion was heard with telephonic oral argument on August 25, 2016. Steven Miskinis, Esq., argued for Defendants. Jeremy R. Larson, Esq., argued for Plaintiff.

I. BACKGROUND

Klickitat County brings this lawsuit against the U.S. Department of Interior (DOI) and the Bureau of Indian Affairs (BIA), and various officials of those two

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1 agencies, seeking declaratory and injunctive relief.¹ In its Complaint, Klickitat
 2 County states that it “brings this action to resolve an active dispute between local
 3 and federal officials concerning the exercise of civil and criminal jurisdiction
 4 within ‘Tract D,’ an area consisting of approximately 99,000 acres in Glenwood,
 5 Washington abutting the Yakama Reservation.” (ECF No. 1 at Paragraph 1.2).

6 On July 17, 2012, the Yakama Nation filed a petition with the State of
 7 Washington asking the State to partially retrocede its civil and criminal
 8 jurisdiction over “all Yakama Nation Indian country.” This was jurisdiction the
 9 State had previously obtained from the federal government pursuant to what is
 10 known as Public Law 280. Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). On
 11 January 17, 2014, Washington Governor Jay Inslee, by Proclamation 14-01,
 12 agreed to retrocede certain aspects of State jurisdiction “[w]ithin the exterior
 13 boundaries of the Yakama Reservation” and not “outside the exterior boundaries
 14 of the Yakama Reservation.”² (ECF No. 1-3).

15 In April 2015, Klickitat County sent a letter to DOI asking that it
 16 “specifically exclude the area known as Tract D” from any acceptance of
 17

18 ¹ BIA is an agency within DOI. Defendants are collectively referred to as
 19 “DOI” in this order.

20 ² The State retroceded full civil and criminal jurisdiction in the areas of
 21 compulsory school attendance, public assistance, domestic relations and juvenile
 22 delinquency; jurisdiction over operation of motor vehicles on public roads except
 23 where the civil cause of action or criminal offense involves “non-Indian plaintiffs
 24 [or] non-Indian defendants, and non-Indian victims;” and criminal jurisdiction
 25 over all other offenses except when they involve “non-Indian defendants and non-
 26 Indian victims.”

1 retroceded jurisdiction in order to avoid any claim by the Yakama Nation to civil
 2 and criminal jurisdiction within Tract D. This request was not answered. (ECF
 3 No. 1 at Paragraph 1.7 and ECF No. 1-4).

4 By letter dated October 19, 2015, DOI formally accepted the State's partial
 5 retrocession of jurisdiction "pursuant to 25 U.S.C. § 1323 and authority vested in
 6 the Secretary of Interior by Executive Order No. 11435 of November 21, 1968, 33
 7 Fed. Reg. 17339, and delegated to the Assistant Secretary-Indian Affairs."³ Tract
 8 D was not specifically mentioned in the letter, but Kevin Washburn, then Assistant
 9 Secretary of Indian Affairs, wrote:

10 On April 30, 2015, I met with the Governor's General
 11 Counsel to discuss retrocession. An issue that has been
 12 highlighted in several meetings is related to reservation
 13 boundaries. We have assured anyone who has asked that
 14 this process is not a mechanism for redrawing reservation
 15 boundaries. The scope of the Yakama Nation's territorial
 16 jurisdiction will be governed by Federal law. The decision
 17 before my Office is nothing more than an acceptance of the
 18 State's request for retrocession. As explained to the Governor's
 19 office, this decision is not intended to affect the boundaries

20 ³ 25 U.S.C. § 1323(a) provides: "The United States is authorized to accept a
 21 retrocession by any State of all or any measure of the criminal or civil jurisdiction,
 22 or both, acquired by such State pursuant to the provisions of section 1162 of Title
 23 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat.
 24 588), as was in effect prior to its repeal by subsection (b) of this section."

25 Executive Order No. 11435 provides the Secretary of the Interior with the
 26 discretion to accept retrocession and imposes two requirements: 1) acceptance of
 27 retrocession is effected through publication in the Federal Register with such
 28 notice specifying "the jurisdiction retroceded and the effective date of the
 retrocession" and 2) where criminal jurisdiction is retroceded, acceptance may
 occur "only after consultation by the Secretary with the Attorney General."

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1 of the reservation in any way. As noted above, this decision
 2 does not expand tribal jurisdiction; it merely eliminates State
 3 authority over certain offenses on the reservation.

4 (ECF No. 1-5 at p. 4).

5 Notice of the partial retrocession was published in the Federal Register on
 6 October 20, 2015, indicating “[c]omplete implementation of jurisdiction will be
 7 effective April 19, 2016.” (ECF No. 1-6).

8 Klickitat County filed this lawsuit on April 18, 2016, seeking a judgment
 9 declaring that DOI violated the Administrative Procedure Act (APA), 5 U.S.C. §
 10 706, by: (1) refusing to address whether the State intended to retrocede jurisdiction
 11 over Tract D; (2) failing to acknowledge or otherwise address Klickitat County’s
 12 request that Tract D be specifically excluded from any acceptance of retroceded
 13 jurisdiction; (3) refusing to decide the issue of whether acceptance covered Tract
 14 D; and (4) leaving it to the courts to provide a “definitive interpretation” of their
 agency action.⁴ (ECF No. 1 at Paragraph 1.9).

15 Klickitat County alleges DOI “acted in excess of statutory jurisdiction,
 16 authority, limitations and short of statutory right by not expressly excluding Tract
 17 D from the government’s acceptance of retrocession, thus implicitly assuming
 18 federal jurisdiction over Tract D and approving concurrent tribal jurisdiction
 19 without authority to do so.” (ECF No. 1 at Paragraph 6.5). Because of this
 20 alleged assumption of jurisdiction over Tract D, Klickitat County contends DOI is
 21 “interfering with the County’s lawful assertion of jurisdiction over Tract D.”

22
 23 ⁴ In his October 19, 2015 letter to the Yakama Nation, Kevin Washburn
 24 also wrote: “If a disagreement develops as to the scope of retrocession, we are
 25 confident that courts will provide a definitive interpretation of the plain language
 26 of the Proclamation.” (ECF No. 1-5 at p. 5).

1 (ECF No. 1 at Paragraph 6.9). Therefore, in addition to declaratory relief, the
 2 County seeks to permanently enjoin DOI from asserting jurisdiction over Tract D.
 3

4 **II. DISCUSSION**

5 **A. 12(b)(1)- Subject Matter Jurisdiction**

6 A challenge under the APA constitutes a federal question which provides
 7 this court with subject matter jurisdiction pursuant to 28 U.S.C. § 1331.
 8 Nevertheless, DOI contests whether Klickitat County has standing and whether its
 9 dispute with DOI is ripe for adjudication.

10 When a Fed. R. Civ. P. 12(b)(1) motion is filed in conjunction with other
 11 motions, as is the case here, the court normally considers the Rule 12(b)(1) motion
 12 first because doing so prevents a court without subject matter jurisdiction from
 13 prematurely dismissing a case with prejudice. While standing and ripeness are
 14 appropriate grounds for a 12(b)(1) motion because these requirements limit subject
 15 matter jurisdiction, they do not take away from the fact that this court has federal
 16 question subject matter jurisdiction. Accordingly, this court is not compelled to
 17 address the standing and ripeness issues raised by DOI and may proceed to
 18 address the merits without concern that it is dismissing the case prematurely.

19 DOI advances arguments against standing which actually bleed over into the
 20 merits and allege substantive defects in Plaintiff's Complaint that are the subject
 21 of DOI's Fed. R. Civ. P. 12(b)(6) motion. For example, DOI asserts that
 22 "[p]laintiff here seeks a determination that goes beyond any statutory requirement
 23 for retrocession found in 25 U.S.C. § 1323, and alleges standing based on the lack
 24 of information in Interior's acceptance of the State's retrocession regarding the
 25 status of Tract D." (ECF No. 12 at p. 6)(emphasis added). DOI further asserts that
 26 "here, Interior did provide all of the information required by law to justify

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1 acceptance of the State's retrocession" (ECF No. 12 at pp. 6-7). The
 2 question that goes to the merits and is the subject of DOI's 12(b)(6) motion is
 3 precisely whether DOI provided all of the information it was required by law to
 4 provide in order to accept the State's retrocession.⁵

5

6 **B. 12(b)(6)- Failure To State A Claim**

7 A Fed. R. Civ. P. 12(b)(6) dismissal is proper only where there is either a
 8 "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under
 9 a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
 10 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all
 11 material allegations in the complaint, as well as reasonable inferences to be drawn
 12 from such allegations. *Mendocino Environmental Center v. Mendocino County*,

14 ⁵ DOI contends that its "acceptance of the State's partial retrocession of
 15 jurisdiction over the Yakama Nation's Reservation provides Plaintiff no standing
 16 to invoke this Court's subject matter jurisdiction over its boundary dispute with
 17 the Nation." (ECF No. 9 at p. 9). It seems, however, that Plaintiff does have
 18 standing to invoke this court's subject matter jurisdiction over Plaintiff's dispute
 19 with DOI as to whether DOI, as part of its acceptance of retrocession, had a legal
 20 obligation to specify the geographic scope of the jurisdiction retroceded in an
 21 attempt to ascertain whether Plaintiff in fact has a boundary dispute with the
 22 Yakama Nation. As DOI recognizes, that question is distinct from the question of
 23 whether Tract D lies within the Yakima Reservation. The question of whether
 24 DOI properly accepted a partial retrocession of jurisdiction within the exterior
 25 boundaries of the Yakima Reservation is "ripe" for adjudication and is resolved by
 26 this order.

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1 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898
2 (9th Cir. 1986). The complaint must be construed in the light most favorable to
3 the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th
4 Cir. 1995). The sole issue raised by a 12(b)(6) motion is whether the facts
5 pleaded, if established, would support a claim for relief; therefore, no matter how
6 improbable those facts alleged are, they must be accepted as true for purposes of
7 the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).
8 The court need not, however, accept as true conclusory allegations or legal
9 characterizations, nor need it accept unreasonable inferences or unwarranted
10 deductions of fact. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399,
11 1403 (9th Cir. 1996). “Factual allegations must be enough to raise a right to relief
12 above the speculative level . . . on the assumption that all the allegations in the
13 complaint are true (even if doubtful in fact)” *Bell Atlantic Corporation v.*
14 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). The factual allegations must
15 allege a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1951
16 (2009).

17 This court concludes the Klickitat County has asserted a new requirement
18 for DOI to meet before accepting a retrocession of jurisdiction which has no basis
19 in law. Therefore, Plaintiff’s Complaint fails to allege a cognizable legal theory
20 and must be dismissed. “Rule 12(b)(6) authorizes a court to dismiss a claim on the
21 basis of a dispositive issue of law.” *Nietzke*, 490 U.S. at 326. It suffices for DOI
22 to accept the partial retrocession on the terms on which it was offered- “as
23 applying within the exterior boundaries of the Yakama Reservation,” whatever
24 those may be. DOI’s acceptance of that partial retrocession is not an agency
25 declaration of the Yakama Reservation boundaries.

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Under the APA, courts review agency action pursuant to an “arbitrary and capricious” standard of review. 5 U.S.C. § 706(2). The court can set aside agency action that is “arbitrary and capricious,” but it “does not empower the district court to conduct a de novo review of the administrative decision and order the agency to reach a particular result.” *Mt. St. Helens Min. and Recovery Ltd. P’ship v. United States*, 384 F.3d 721, 727 (9th Cir. 2004). Plaintiff points to no statutory or regulatory obligation requiring a determination of reservation boundaries in the context of acceptance of retrocession. Furthermore, DOI is not obligated under 25 U.S.C. § 1323(a) to ensure that a State proffer of jurisdiction is valid under state law. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *reversed on other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *affirmed at* 460 F.2d 1327 (8th Cir. 1972)(per curiam).

Plaintiff focuses on the adequacy of the factual allegations in its Complaint without addressing whether, in the first instance, it has a cognizable legal theory. In the absence of some legal authority (statutory, regulatory or otherwise) plausibly suggesting that as part of its acceptance of the State’s partial retrocession, DOI was obligated to ascertain the precise territorial boundaries of the Yakama Nation Reservation, the adequacy of the factual allegations in Plaintiff’s Complaint (for example, regarding actual and potential injury) is irrelevant.

One of the cases cited by Plaintiff, *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), recognizes the critical question under the APA is what is required by the agency under the applicable statute. Plaintiff does not say what it

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1 is in 25 U.S.C. § 1323 that requires DOI to determine the geographic boundaries
2 of the Yakama Reservation as part of accepting a retrocession of State jurisdiction
3 within those boundaries. Plaintiff's Complaint alleges “[t]he Department of
4 Interior and BIA acted in excess of statutory jurisdiction, authority, limitations and
5 short of statutory right by not expressly excluding Tract D from the government's
6 acceptance of the State's retrocession . . .” (ECF No. 1 at 23-24), but does not
7 specify what “statutory jurisdiction, authority and limitations,” and how these
8 things were purportedly contravened.

9 Plaintiff repeatedly asserts and assumes the retrocession at issue
10 “increased” and “expanded” federal government jurisdiction. The federal
11 government, however, merely accepted the return of jurisdiction from the State
12 which the State has previously acquired from the federal government pursuant to
13 Public Law 280. Retrocession neither increased or decreased federal jurisdiction
14 within the exterior boundaries of the Yakama Reservation, including Tract D if it
15 is within those boundaries. Retrocession simply restored jurisdiction to the
16 federal government which it previously had. In other words, the federal
17 government re-assumed its jurisdiction.

18 Plaintiff assumes Tract D is not within the exterior boundaries of the
19 Yakama Reservation. According to Plaintiff, “because Tract D is not within the
20 Reservation, Tract D is not subject to retrocession under 25 U.S.C. § 1323 and
21 Defendants have acted outside their authority to the extent they have assumed
22 jurisdiction over Tract D pursuant to retrocession.” (ECF No. 10 at p. 10). The
23 argument is that because Tract D was never within the Yakama Reservation, the
24 federal government never conferred any jurisdiction upon the State pursuant to
25 Public Law 280 and therefore, there is now no jurisdiction which can be
26 retroceded with regard to Tract D. This is a valid argument if Tract D is not part

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1 of the Reservation, but that is a question which was not resolved by the
 2 retrocession, did not need to be resolved by it, and remains unresolved. The
 3 federal government did not “assume jurisdiction over Tract D pursuant to
 4 retrocession.” It either already had it because Tract D is within the Reservation, or
 5 it never had it and still does not have it because Tract D is not within the
 6 Reservation.

7 As required by Executive Order No.11435, DOI specified the jurisdiction
 8 retroceded by the State and the effective date of retrocession. In a Federal
 9 Register notice, DOI identified the jurisdiction as “partial civil and criminal
 10 jurisdiction over the Yakama Nation which was acquired by the State of
 11 Washington, under Public Law 83-280, 67 Stat. 588, codified as amended at 18
 12 U.S.C. 1162, 28 U.S.C. 1360,” with reference to the Governor’s Proclamation 14-
 13 01. 80 Fed. Reg. 63,583 (Oct. 20, 2015). (ECF No. 1-6). The particular areas of
 14 civil and criminal jurisdiction were set forth in the proclamation (ECF No. 1-3)
 15 and that is what DOI accepted (ECF Nos. 1-5). Beyond the obvious need for
 16 identifying the Reservation to which the retrocession pertains, Executive Order
 17 No. 11435 does not require DOI to provide a metes and bounds description of
 18 Reservation boundaries. Accordingly, DOI was not required, as part of its
 19 acceptance of the retrocession, to specify whether Tract D lies within Yakima
 20 Reservation boundaries. Such specification was not essential to the validity of the
 21 partial retrocession accepted by DOI.

22 “[C]onsiderable weight [is] accorded to [a federal] executive department’s
 23 construction of a statutory scheme it is entrusted to administer” *United States*
 24 v. *Mead Corporation*, 533 U.S. 218, 227-28, 121 S.Ct. 2164 (2001). DOI offers
 25 persuasive arguments that its interpretation of the requirements of Executive Order
 26 ///

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1 No. 11435 (issued pursuant to 25 U.S.C. § 1323(a)) is sensible because: 1)
2 defining a reservation with metes and bounds description threatens to entangle the
3 acceptance of retrocessions with reservation boundary disputes; and 2) simply
4 identifying by name the reservation subject to retrocession means the scope of
5 retrocession can expand or contract with subsequent judicial decisions or other
6 events affecting the boundaries of the reservation.

7 Plaintiff's Complaint does not allege a "legally cognizable basis" that DOI
8 acted "arbitrarily and capriciously" by failing to specify whether Tract D lies
9 within the exterior boundaries of the Yakama Reservation. While the court is
10 sympathetic to Plaintiff's concern about jurisdictional uncertainty regarding
11 ownership of Tract D, this is an uncertainty that existed before retrocession and
12 continues to exist thereafter. It will have to be resolved if and when federal
13 jurisdiction is in fact sought to be exercised within Tract D.

14

15 III. CONCLUSION

16 By proceeding on the legal theory that 25 U.S.C. § 1323 and Executive
17 Order No. 11435 require DOI to specify the geographic scope of the jurisdiction
18 retroceded, more specifically, whether DOI intends to exercise jurisdiction in
19 Tract D because it considers Tract D to be part of the Yakama Reservation,
20 Plaintiff fails to allege a cognizable legal theory upon which relief can be granted.
21 Accordingly, Defendants' Motion To Dismiss (ECF No. 9) is **GRANTED** and
22 Plaintiff's Complaint is **DISMISSED** with prejudice.

23 The District Executive is directed to enter Judgment accordingly and to
24 forward copies of this order and the Judgment to counsel of record. The file shall
25 be **CLOSED**.

26 ///

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IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

DATED this 1st day of September, 2016.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge

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